Supreme Court, U.S.
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No. 90-1693

In The

Supreme Court of the United States

October Term, 1990

CAROL A. BROWN, M.D.,

Petitioner,

vs.

DONALD WONG; CLYDE VIERRA; FRANKLIN Y.K. SUNN; EARL MOTOOKA; STATE OF HAWAII; and the DEPARTMENT OF HUMAN SERVICES, formerly the DEPARTMENT OF SOCIAL SERVICES AND HOUSING OF THE STATE OF HAWAII,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's federal causes of action alleging, *inter alia*, violations of the Fourth, Sixth, and Fourteenth Amendments, as well as claims for federal enforcement of the regulations of the United States Department of Health and Human Services relating to the Social Security Act, were properly terminated on their merits in the state courts given the lack of evidence or petitioner's offer of proof as to those claims?

2. Whether, notwithstanding the foregoing, petitioner's federal causes of action were properly held barred by the applicable defenses of the statute of limitations, and issue preclusion, the decision of this Court in *Will v. Michigan*, 491 U.S. 58 (1989), and absolute or qualified officer's immunity, or the common law tort rule of independent intervening causation?

3. Whether the dismissal of petitioner's state law causes of action rests upon an independent and adequate state ground, or was otherwise required by compulsion of federal preemption, or, if not, whether such dismissal was nonetheless appropriate?

4. Whether any federal error has been raised by the termination of Plaintiff's claims on summary judgment despite discovery in Petitioner's criminal trial as well as in the state civil courts and noncompliance with Haw. R. Civ. P. 56(f)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 9

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977) 16

Baker v. McCollan, 443 U.S. 137 (1979) 9

Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1986) 18

Borunda v. Richmond, 885 F.2d 1384 (9th Cir. 1988) 18

Brown v. Wong, 71 Haw. 519, 795 P.2d 283 (1990) 9

Bullen v. DeRego, 68 Haw. 587, 724 P.2d 106 (1986), *cert. denied*, 480 U.S. 939 (1986) 19

Burns v. Reed, 59 U.S.L.W. 4536 (U.S. May 30, 1991) 15, 16, 17

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 11

City of Los Angeles v. Heller, 475 U.S. 796 (1986) 10

County of Riverside v. McLaughlin, No. 89-1817 (U.S. May 13, 1991) 11

Dellmuth v. Muth, 491 U.S. 223 (1989) 14

Ex parte United States, 287 U.S. 241 (1932) 11

Ferri v. Ackerman, 444 U.S. 193 (1980) 19

First Hawaiian Bank v. Weeks, 70 Haw. 392, 772 P.2d 1187 (1989) 11

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 15

Forster v. County of Santa Barbara, 896 F.2d 1146 (9th Cir. 1990) 13

Freeman v. Hittle, 708 F.2d 442 (9th Cir. 1983) 16

Gray v. Bell, 712 F.2d 490 (D. C. Cir. 1983) 19

TABLE OF AUTHORITIES – Continued

Page

Gunderson v. Schlueter, 904 F.2d 407 (8th Cir. 1990) 9, 11, 18

Hall v. State of Hawaii, 791 F.2d 759 (9th Cir. 1986) 21

Hayes v. Nagata, 68 Haw. 662, 730 P.2d 814 (1988) 20

Heath v. Alabama, 474 U.S. 82 (1985) 12, 14

Illinois v. Gates, 462 U.S. 213 (1983) 11

Jett v. Dallas Independent School District, 491 U.S. 701 (1989) 15

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) 19

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 14

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 21

Kolender v. Lawson, 461 U.S. 352 (1983) 12

Malley v. Briggs, 475 U.S. 335 (1986) 17

Martinez v. California, 444 U.S. 277 (1980) 20

Monell v. Department of Social Services, 436 U.S. 658 (1978) 15

Murdock v. Memphis, 89 U.S. (20 Wall.) 590 (1875) 20

Paul Kadair Inc. v. Sony Corp., 694 F.2d 1017 (5th Cir. 1983) 21

Pembaur v. Cinncinati, 475 U.S. 469 (1986) 15

Peralta v. Heights Medical Center, Inc., 485 U.S. 80 (1988) (per curiam) 17

TABLE OF AUTHORITIES – Continued

Page

Siegert v. Gilley, 59 U.S.L.W. 4465 (U.S. May 23, 1991) 15, 20

Smiddy v. Varney, 803 F.2d 1469 (9th Cir. 1986) 18

State v. Wyatt, 67 Haw. 293, 687 P.2d 544 (1984) 20

Wards Cove Packing Co, Inc. v. Atonio, 490 U.S. 692 (1985) 13

Washington v. Davis, 426 U.S. 229 (1976) 13

Weatherford v. Bursey, 439 U.S. 545 (1977) 13

Westfall v. Erwin, 484 U.S. 292 (1988) 19

Wilder v. Tanouye, 753 P.2d 816 (Haw. App. 1988) 11

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 14

Wilson v. Garcia, 471 U.S. 265 (1985) 16

Wong v. Panis, 772 P.2d 695 (Haw. App. 1989) 20

STATUTORY PROVISIONS

28 U.S.C. § 1257 10

28 U.S.C. § 1738 11

42 U.S.C. §§ 1396, *et seq* 1, 2

42 U.S.C. § 1983 ..... 2, 7, 14, 15

42 U.S.C. § 1985 14

42 U.S.C. §§ 2000d, *et seq* 14, 15

TABLE OF AUTHORITIES – Continued

Page

Haw. Rev. Stat. § 28-91 (1985) 2

Haw Rev. Stat. § 346-43.5 (1985) 3

Haw. Rev. Stat. § 657-7 (1985) 16

Haw. Rev. Stat. § 661 (1985) 8

LEGISLATIVE HISTORY

48 Fed. Reg. 3742 (Jan. 27, 1983) 2, 3

1977 U.S. Code Cong. & Admin. News 3039, 3082 2

H.R. Rep. No. 95-292 2

ADMINISTRATIVE AND COURT RULES

42 C.F.R. § 455.13(a) & (b) (1985) 3, 10

42 C.F.R. § 455.14 (1985) 3

42 C.F.R. § 455.15 (1985) 3

Haw. Admin. R. § 17-148-3(a) & (b) 3

Haw. R. Civ. P. 54(b) 9

Haw. R. Civ. P. 56(f) 21

Fed. R. Civ. P. 56 21

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This petition arises out of the State of Hawaii's role in administering the funds disbursed pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, known commonly as Medicaid. The issue in this case is whether the State, its Departments, and its officers, having proven in open court, before two state judges, that there was not only probable cause to indict Petitioner Dr. Carol A. Brown on 134 counts of Medicaid fraud, but, as

to 112 of the 134 counts, that there was evidence sufficient to prove guilt beyond a reasonable doubt, may now be subject to damages liability under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and Hawaii tort law, following Dr. Brown's unreviewable acquittal in our state criminal court.

1. Medicaid is a federally-reimbursed, state administered medical assistance program, in which private physicians agree to meet program requirements and are reimbursed accordingly. Because of the vast sums involved and potential for abuse, the Congress has repeatedly endorsed vigorous anti-fraud oversight by state and federal agencies. In 1977, Congress specifically authorized creation of medicaid fraud control units (MFCU's) in the "office[s] of the State Attorney General[s]" of the several States. 42 U.S.C. § 1396b(q); *see* H.R. Rep. No. 95-292, 95th Cong., 1st Sess., *reprinted*, 1977 U.S. Code Cong. & Admin. News 3039, 3082. The MFCUs are "separate and distinct" from the state line agency which administers Medicaid, in Hawaii the Department of Human Services (formerly the Department of Housing and Human Services). 42 U.S.C. § 1396b(q) and H.R.S. § 28-91.

2. In 1983, acting on these concerns, the federal Secretary of Health and Human Services revised Medicaid requirements with respect to fraud detection. 48 Fed. Reg. 3742 (Jan. 27, 1983). The 1983 regulations, in addition to requiring state line agencies to make a "preliminary investigation" upon a "complaint of potential Medicaid fraud or abuse," "ma[d]e it clear that the agency must also act on any questionable practices it identifies through its own detection mechanisms." 48

Fed. Reg. at 3745; *see* 42 C.F.R. § 455.14 (1985) (Pet. App. 38). The 1983 federal regulations also provided that DHS must have "[m]ethods and criteria for identifying suspected fraud cases" and methods for "investigating these cases" that "[d]o not infringe on the legal rights of persons involved" and "[a]fford due process of law," 42 C.F.R. § 455.13(a) and (b) (Pet. App. 38). These requirements, however, do not impose any greater burden than is imposed by the Constitution. 48 Fed. Reg. at 3745. *See also* 42 C.F.R. § 455.15 (Pet. App. 39). The preliminary investigations required by the federal regulations do not of their own force provide pre-indictment process for those Medicaid providers who are the subject of independent criminal enforcement efforts by the State Attorney General. While state regulations allow the line department to provide a due process hearing following "the department's administrative decision" to "[w]ithhold, terminate, or suspend a provider's certification to participate"; "[w]ithold payment of claims"; "[r]ecover money claimed to have been overpaid"; or "[a]ct in a manner disagreeable to the provider relating to the level of care, medical necessity, medical appropriateness, or on claims of service," Haw. Admin. R. § 17-748-3(a) (Pet. App. 49-50), such hearings are required only prior to actual suspension or termination from Medicaid. *See* Haw. Admin. R. § 17-748-3(b). No state administrative rule requires process prior to indictment.

3. Pursuant to this framework, Petitioner was indicated in the Circuit Court for the First Circuit, State of Hawaii, on September 17, 1986, on 134 counts of overbilling Medicaid in breach of Haw. Rev. Stat. § 346-43.5. The State's essential claim was that Dr. Brown, a psychiatrist,

fraudulently sought and obtained payment for fifty-minute face-to-face sessions with her patients when she spent less time with them. *See* Order Granting in Part, and Denying in Part, Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment at ¶ 1, No. 88-2370 (Haw. Cir. Mar. 4, 1990) (Pet. App. 3, 4) (*"Brown I"*). The Attorney General's investigation against Dr. Brown had been pending, at that time, for over ten months. On November 4 and 5, 1985, search warrants were obtained on affidavit and executed against Dr. Brown's business office, and her home. *Id.* Prior to that time, MFCU investigators interviewed Dr. Brown's patients and employees, appearing at Dr. Brown's office as early as October 21, 1985. *See* Pet. App. 5.

4. The Grand Jury that indicted Dr. Brown heard testimony from seventeen witnesses, including Dr. Brown's receptionist, Sadie Kobayashi, who testified that it was normal practice for Dr. Brown to submit "pre-prepared" Medicaid claim forms for 50-minute psychotherapy sessions, and that in numerous cases, Dr. Brown refused to adjust the claim forms when patients were seen for substantially shorter periods, even as little as 12 minutes. *See* Tr. of Grand Jury Proceedings at 14-15, Cr. No. 86-1072 (Haw. Cir. Sept. 17, 1986) (Resp. App. "A," *infra*). Kobayashi testified that Dr. Brown did this "often," that she "confront[ed]" Dr. Brown with this practice, and that Dr. Brown "justified" doing what she did because she did other work for her patients that "took up time." *Id.* at 16, 2 R. 116. Kathryn Buckley, another receptionist for Dr. Brown, testified that Dr. Brown did not make adjustments in "the vast majority" of cases where 50-minute sessions had been "pre-billed" and that, given the

number of sessions Dr. Brown scheduled during an average day, it "could not" "have been possible" for Dr. Brown to have seen her patients in face-to-face sessions for the time she billed. *Id.* at 21 (Resp. App. 22). Buckley stated that, after warrants were executed, she discussed billing practice with Dr. Brown, and Dr. Brown stated her billings were justified by clearly non-billable activities such as "court apperances" and "attorney reports," and that, in light of this extra work, Dr. Brown believed she could claim for 50-minute sessions as "she just felt" "this was right." *Id.* at 22 (Resp. App. 22). Eleven of Dr. Brown's patients testified that they never saw Dr. Brown in a face-to-face session for a 50 minutes.[1]

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[1] *Id.* at 25 (Addie Farr (15-20 minutes)); *id.* at 30 (John Gesang ("usually" 10-15 minutes; "one or two" 45 minute sessions)); *id.* at 32 (Felila Alcarion (none lasted 45-50 minutes)); *id.* at 34 (Soon Yang ("some time 40 minutes, some time 20 minutes, 15 minutes, 30 minutes")); *id.* at 36-37 (Lina Bellen (as out-patient 15-30 minutes)); *id.* at 38-39 (Betty Jane Kam ("15 minutes or 20 minutes" on "all of them"; "just write out the prescription, bang, zoom, and out")); *id.* at 41 (Patricia Drake ("10 or 15 minutes" although "some times they were longer" but at most 45 minutes)); *id.* at 42 (Jennifer Kaeo ("up to 15 minutes")); *id.* at 43 (Anna Basque Silva ("longest was about 20 minutes")); *id.* at 44-45 (Sandra Lynn Brown ("15 minutes to a half hour")); *id.* at 47 (Joni Wilson ("about 20 minutes" at most)). Testimony by MFCU investigator Donald Wong related that Dr. Brown's patients Ronalda Barrymore, and Yvette Vanschoor, after initial sessions with Dr. Brown of up to an hour's length, had sessions that were "shorter and shorter." *Id.* at 27. Carol Takano, of Hawaii Medical Services Association, identified 134 claims submitted by Dr. Brown for work she performed for the thirteen patients, corroborated they corresponded to the counts of the indictment, and

(Continued on following page)

5. Dr. Brown moved in the state criminal court to dismiss, claiming that the indictment was procured by allegedly perjured testimony of Attorney General Investigator (and Respondent here) Donald Wong, was, as a general matter, based on "hearsay, innuendo and incomplete evidence," was procured by "misconduct of the prosecutor," and rested upon the testimony of persons whose "competency would be questionable as a witness in a judicial proceeding." Dr. Brown also claimed billing authorizations she was alleged to have breached were (1) not promulgated in conformity with state law; (2) were unconstitutionally vague; and (3) were an unlawful delegation. *See Brown I*, Pet. App. 5-6. State Circuit Court Judge Marie N. Milks denied the motion, after oral hearings, and, likewise, denied Dr. Brown's motions to suppress. *See id.*, Pet App. 6-11. Judge Milks found that the State's rules and regulations were "sufficiently clear to fairly place Defendant on notice as to the requirements of the law," and that the indictment was backed by evidence of probable cause. *Id.*, Pet. App. 8-9.

6. At Dr. Brown's trial, Circuit Judge Wilfred Watanabe, in rejecting Dr. Brown's motion for a complete judgment of acquittal at the close of the prosecution's case, ruled "the Hawaii Administrative Rules require personal contact," and that "there was [proper] warning." *See* Pet. App. 11-12. While, as to 112 of the 134 counts,

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confirmed that Dr. Brown billed for fifty minute face-to-face sessions for each patient. *Id.* at 49-50. Ms. Takano confirmed that Dr. Brown had no authority to bill for telephone calls, paperwork, or, in fact, any period of time other than "the visit." *Id.* at 52.

Defendant's "argument regarding the evidence being insufficient to establish a prima facie case is not well taken," *id.*, Judge Watanabe nonetheless, after trial, found that, while "it seems reasonably clear to me that defendant was probably overcharging the system," "the State has not sustained its burden of proof beyond a reasonable doubt, and I have to find the defendant not guilty." Pet. App. 12-14. A judgment of acquittal, not appealable, was entered. *See id.*

7. At no time prior to or during the criminal fraud case against her was Dr. Brown suspended or terminated from the Medicaid program, and, likewise, at no time prior to or during the criminal proceeding did Dr. Brown request a due process hearing before the Department of Human Services (or its predecessor) pursuant to the relevant administrative rules.

8. The action from which this appeal arises was filed on July 29, 1988. *See* Pet. App. 14. Dr. Brown's complaint sought damages from four different state officers, MFCU Investigators Donald Wong and Clyde Vierra, Earl Motooka, from 1979 through July 1986 the acting or permanent Medicaid Administrator, Public Welfare Division, Department of Social Services and Housing (now the Department of Human Services ("DHHS" or "DHS")), and Franklin Sunn, the former Director of DHHS. The named officers were sued in their individual capacities in damages counts seeking recovery for violation of the federal Civil Rights Act of 1871, 42 U.S.C. § 1983, (Count VI), and on the basis of alleged state torts (infliction of emotional distress, invasion of privacy, and tortuous interference with contracts). Damages were also sought from Defendants Motooka and Sunn on the basis

of their alleged "negligent administration" of the Medicaid program (Count III). Damages were also sought from the State on all counts by reason of claims against the officers in their official capacities and the State and DHS directly. A claim for "breach of contracts" (Count II) was also filed against the State and DHS only under Chapter 661, H.R.S. (1985). No equitable relief at all was sought. After approximately 2,000 pages of documents were tendered to Petitioner, *see* Resp. App. "B," *infra,* Respondents sought and obtained a stay of further discovery pending resolution of immunity and other legal issues. *See* Pet. App. 4, 25.

9. On March 5, 1990, the Circuit Court, Robert G. Klein, J., granted Defendants' motion as to all claims except the claim for breach of contract. In the main passing over Respondents' argument that the summary judgment record could not support an inference of constitutional wrongdoing, the court held all of the tort and federal claims were barred by the rule of intervening cause, in that "two judges intervened between the alleged wrongful acts of the officials and the trial of the plaintiff," and "[a]ll of the defects concerning the indictment and the search were presented in the pretrial motions." Pet. App. at 16-17. The Court emphasized, in addition, that Defendants had additional defenses "which cannot be refuted," arising from the doctrine of qualified immunity, and that neither the State, its departments, nor its officers sued in their official capacities, could be the subject of damages suits under the federal civil rights acts. *See* Pet. App. at 16-17. Petitioner's tort claims were, likewise,

found to have been independently barred on the basis of considerations of public policy, and, insofar as the State was concerned, limitations on the waiver of sovereign immunity codified in the State Tort Liability Act. *Id.* at 17-19. The adverse rulings against Petitioner were certified pursuant to Rule 54(b), Haw. R. Civ. P., as a final judgment, and both Petitioner and the State appealed those rulings adverse to them. The State's appeal from the trial court's refusal to afford it immunity from the contract claim was dismissed in July, 1990, as an improper interlocutory appeal. *Brown v. Wong*, 71 Haw. 519, 795 P.2d 283 (1990) (*"Brown II"*). In Petitioner's appeal of the Rule 54(b) judgment, the Supreme Court of Hawaii affirmed in a summary order. Pet. App. 1-2.

REASONS FOR DENYING THE WRIT

The Petition raises no substantial federal question, and should be denied. Contrary to the Petition's broad statements, the decision below does not make Medicaid providers "slaves of the Medicaid program without any rights" (Pet. at 15). Rather, this is an instance where, as this Court has observed, "[t]he Constitution does not guarantee that only the guilty will be arrested." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). As the Supreme Court of Hawaii impliedly held, Petitioner's acquittal was "the full extent of [her] remedy." *Gunderson v. Schlueter*, 904 F.2d 407, 410 (8th Cir. 1990). She has no civil claim here.

1. The underlying merits of Petitioner's federal claims, over which this Court could assert jurisdiction

under 28 U.S.C. § 1257,[2] are in all relevant respects governed by settled constitutional standards, properly raised by Respondents and properly applied by the courts below. Petitioner's efforts to embellish upon these claims by wrapping her case in the cloth of the federal Medicaid regulations are to no avail, because all those regulations do, so far as Petitioner is concerned, is require that States enact procedures for investigations that will comply with constitutional standards. *See, e.g.*, 42 C.F.R. § 455.13.[3] Those regulations, which Petitioner did not invoke during the entire course of the criminal case, do not require pre-indictment process or impose other constraints where the Constitution would not. Petitioner's panoply of federal claims can thus be resolved on the merits by determining whether she endured a "constitutional harm." *City of Los Angeles v. Heller*, 475 U.S. 796, 799

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[2] There is some possibility that the interlocutory posture of Petitioner's breach of contract claim renders the judgment of the Supreme Court of Hawaii nonfinal for purposes of 28 U.S.C. § 1257 even though final as to the matters within its compass within the Hawaii court system. Respondents, without conceding that this case falls within the ambit of § 1257, nonetheless urge that certiorari be denied on other grounds herein.

[3] The apparent gist of Petitioner's statutory claim is that the State or its officers were required under the federal rules to conduct a "preliminary investigation" on the record and with opportunity to be heard prior to indicting Petitioner. The rules simply do not support this argument; rather, the federal regulations (and their state-law analogues) simply prohibit the state line agency (here DHS) to refuse to refer for prosecution suspected fraud cases without a preliminary investigation. The rules *do not* operate as an "exhuastion" requirement that must be hurdled before the State may indict a Medicaid provider.

(1986) (per curiam). Viewing the facts through the lens of Hawaii summary judgment procedure, which mirrors its federal counterpart,[4] Petitioner suffered no federal injury.

a. *First*, the main of Dr. Brown's federal claims sound in an improper effort to federalize the tort of malicious prosecution. Dr. Brown raises no claim she was improperly detained, *cf. County of Riverside v. McLaughlin*, No. 89-1817 (U.S. May 13, 1991), and the circuits "are uniform in holding that malicious prosecution by itself is not punishable under section 1983." *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990) (citing cases from the 4th, 5th, 6th, 8th, and 9th circuits). Moreover, any such "federalized" claim would have to fail here, as there was overwhelming evidence from which to conclude that probable cause existed. Such evidence requires demonstration of " 'only the probability, and not a prima facie showing, of criminal activity.' " *Illinois v. Gates*, 462 U.S. 213, 235 (1983). Indeed, indictment by grand jury conclusively establishes probable cause. *Ex parte United States*, 287 U.S. 241, 250 (1932). And, if that were not all, two different state judges independently ruled, first, that there was sufficient cause to indict Dr. Brown as to all 134 felony fraud counts, and, what's more, to *convict* on at least 112 of those counts. Under the Full Faith and Credit Statute, 28 U.S.C. § 1738, this Court, no less than the inferior federal courts, would be required to defer to these fully litigated state court rulings. At the very least,

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[4] *See generally First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)); *Wilder v. Tanouye*, 753 P.2d 816, 820-21 (Haw. App. 1988) (discretion conferred by Rule 56(f)).

however, the highly probative testimony of Dr. Brown's employees, who tellingly reported Dr. Brown's virtual admissions of criminal wrongdoing, rightly end any probable cause determination that might be of concern to this Court.

b. *Second*, Dr. Brown's claim that she was prosecuted on the basis of unconstitutionally vague standards of conduct is likewise incorrect. Thus, Dr. Brown's own court papers in the criminal case revealed that she was on notice that " '[c]laims submitted to the Medicaid Program for payment by a psychiatrist or psychologist for services he/she does not render *personally* to an eligible welfare recipient . . . shall be treated as a fraudulent billing practice.' " *See* Exh. "F" to Mot. to Dis. Indictment (Def. Exh. "B" below). The State Circuit courts twice ruled in Dr. Brown's criminal case that she was not prosecuted on the basis of standards that violated the admonitions of this Court in such cases as *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). These findings were amenable to a preclusion bar below, and, it follows, here; in any case the Petition does not present anything to show a federal wrong.

c. *Third*, Dr. Brown alludes to a violation of her Sixth Amendment right to a fair trial (*see* Pet. at 13), which, she alleges, arose out of a conspiracy to "invade" the defense camp in her criminal case. This claim, however, was not raised in the state trial court below at the summary judgment stage, was not preserved for review in the Supreme Court of Hawaii, and is not properly in this Court. *See Heath v. Alabama*, 474 U.S. 82, 87 (1985). In any case, the evidence to support the claim was not sufficient to defeat summary judgment. Not only did

Petitioner fail to put forth any concrete proof that the partner of a former Deputy Attorney General sought to obstruct the judicial process (*see* Pet. at 13), she did not show any prejudicial "invasion" of the defense camp. According to her own conclusory account, she refused to acquiesce in the alleged conspiracy to have her plead guilty, and won her criminal trial. No Sixth Amendment injury was suffered. *See Weatherford v. Bursey*, 439 U.S. 545, 558 (1977) (on an analogous claim).

d. *Fourth*, Dr. Brown's claim she was discriminatorily prosecuted on the basis of her race and sex are similarly ill-founded. Dr. Brown's allegations of "disparate impact" of the Hawaii Attorney General's prosecutory efforts are not sufficient to raise even a colorable Equal Protection claim under relevant case law. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). In addition, Dr. Brown's proffered evidence does not even properly show disparate impact on any protected group. In fact, the decisions of this Court make clear that, for example, simply looking at such gross numbers as the relative percentages of male and female doctors prosecuted is a "nonsensical" way to establish a prima facie case of disparate impact. *See Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 692, 651 (1989). Indeed, having failed to show even that a greater percentage of women or caucasians were prosecuted, Pet. at 8, Dr. Brown fails to present any known theory of disparate impact analysis. Petitioner's First Amendment claim was also without basis. *Forster v. County of Santa Barbara*, 896 F.2d 1146 (9th Cir. 1990).

e. Finally, Dr. Brown's unsupported reference (Pet. at 1) to the Contract Clause is unavailing. There is

no record the such a claim was properly preserved in the lower courts beyond its mere assertion in the Complaint; the claim has been waived. *See Heath v. Alabama, supra.* In any case, however, no contract was at the least impaired by the state's actions, much less sufficiently impaired to invite review. The Contract Clause does not immunize physicians, even those who are in the end acquitted, from the reach of the States' criminal processes. *See, e.g., Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470, 502-03 (1987) (and the cases cited therein).

2. Even if there were any doubt as to the foregoing, no federal issue in this case merits review, because Petitioner's claims would still fail under this Court's precedents.

a. No serious argument can be made in support of Petitioner' claims arising under 42 U.S.C. §§ 1983 and 1985 for damages against the State, its departments, or its officials sued in their official capacities. Such claims are plainly disposed of by *Will v. Michigan Department of State Police,* 491 U.S. 58 (1989). In a similar vein, it is dubious whether Petitioner has a claim for money damages against the State under Title VI of the Civil Rights Act (42 U.S.C. §§ 2000d *et seq.* Title VI, like 42 U.S.C. § 1985, does not apply to sex discrimination; even as to a claim of race discrimination, Petitioner was not "excluded from participation in," "denied the benefits of" or "subjected to discrimination under" "any program or activity receiving Federal financial assistance." *See* 42 U.S.C. § 2000d. It is, in addition, unlikely that this Court would deem Congress to have authorized retroactive money remedies against States for violations of Title VI. *Compare* 42 U.S.C. §§ 2000d *et seq.* and *Dellmuth v. Muth,* 491 U.S. 223 (1989),

with id. §§ 2000e *et seq.* (providing specific authority for retroactive awards) and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Title VII applies to the States).

b. Even if the foregoing would not preclude any of Petitioner's federal claims against Respondents Wong, Vierra, Sunn, and Motooka in their individual capacities, such claims would plainly be barred by the "protective" doctrine of qualified officer's immunity, which " 'provides ample support to all but the plainly incompetent or those who knowingly violate the law.' " *See Burns v. Reed*, 59 U.S.L.W. 4536, 4541 (U.S. May 30, 1991). It is, as argued above, dubious "whether the plaintiff has asserted a violation of a constitutional right at all," *Siegert v. Gilley*, 59 U.S.L.W. 4465, 4467 (U.S. May 23, 1991), but, even if her complaint and the record on summary judgment were to the contrary, that would not counsel granting review. To the extent they were involved in the decisions of which Petitioner complains,[5] Respondents – like the Attorney General of Hawaii and the grand jurors and two state court judges who validated their decisions – were not "plainly incompetent" or reckless in the face of

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[5] An additional defect in the Petition is that, at least with respect to Respondents Motooka and Sunn, there is no specific claim of – or evidence to show – their personal involvement in the actions challenged sufficient to render them liable under the "subjects or causes to be subjected" language of 42 U.S.C. § 1983, or analogous provisions of § 1985 or § 2000d. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny, *e.g.*, *Pembaur v. Cinncinati*, 475 U.S. 469, 485-87 (1986) (White, J., concurring), and *Jett v. Dallas Independent School District*, 491 U.S. 701, 735-39 (1989).

"clearly established law." As such, they would be entitled to qualified immunity even if under the clarified standards for absolute prosecutorial immunity articulated by *Burns v. Reed, supra,* some of the asserted conduct at issue could be characterized as taking place in "the investigative phase of the case." *Burns, supra,* 59 U.S.L.W. at 4590.

c. The "individual capacity" claims were also barred by a proper application of absolute immunity principles. To see this, it is only necessary to observe that "the investigative phase of the case" against Dr. Brown had been completed by July, 29, 1986, the earliest period Dr. Brown could properly challenge under the two-year limitations period applicable to § 1983 (and related) actions in Hawaii. *See* Haw. Rev. Stat. § 657-7 and *Wilson v. Garcia,* 471 U.S. 265 (1985). Search warrants had been executed more than eight months previously, and Dr. Brown had been well notified of the State's intention to join issue in Court over her billing practices. Dr. Brown, it is to be stressed, does not allege any specific "investigative" act or omission between July 29, 1986, and the convening of the Grand Jury in September, 1986, that would oust the absolute immunity that has been traditionally accorded to the Attorney General. *See* Pet. App. at 82-96. The courts of appeals are, to date, uniform in concluding that the Attorney General's investigators are to be accorded the same immunity as their superiors, *Freeman v. Hittle,* 708 F.2d 442, 443 (9th Cir. 1983); *Atkins v. Lanning,* 556 F.2d 485, 488 (10th Cir. 1977), and this approach accords with the "functional" test confirmed by this Court in *Burns v. Reed, supra,* 59 U.S.L.W. at 4541 (and cases cited). In this case, unlike *Burns v. Reed,* there is no

activity that was *properly* pled outside the Hawaii state adjudicative context. At the very least, very substantial portions of the Complaint are unquestionably barred by settled absolute immunity precepts, particularly the specific acts of Petitioners Wong and Vierra in connection with the Grand Jury and later proceedings in the state criminal case. *See Burns*, 59 U.S.L.W. at 4539-40 & n.6. Petitioner, however, does not in any way seek to draw distinctions between the different contexts in which Respondents are alleged to have acted, and, under these circumstances, the Court should "deal with the case as it came here," *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988) (per curiam), and deny the writ as improperly presenting any immunity question.

4. Although the foregoing reasons make it unnecessary to reach the issue, Petitioner's challenge to the lower courts' reliance, if any, upon the doctrine of "intervening causation" does not merit review. Although this Court, in a dictum in *Malley v. Briggs*, 475 U.S. 335 (1986), suggested disapproval of the " 'no causation' rationale' " in the context of judicial validation solely by *ex parte* process, *see* Pet. at 20, this concern is not implicated in this case, where the "intervening causes" were judicial decisions rendered after *adversary* process. Moreover, even since *Malley*, the courts of appeals have been unanimous in approving the appropriate use of the rule of intervening cause, which is well embedded in the law of torts, to avoid needless conflict between civil and criminal adjudications.

> *Malley* never considered the question of whether, once an arrest has incorrectly occurred, later independent decisions of prosecutors,

> juries and judges to prosecute, indict, convict, and sentence would break the chain of causation for damages that might relate to the original unlawful seizure. But we believe that these independent acts must break the causal connection and that Barts' extended detention was caused by these public authorities.
>
> . . . .
>
> Once someone is arrested and then substantial evidence of the suspect's guilt comes to light, the police can do little or nothing to stop further proceedings. Holding the police responsible for damage due to these later proceedings makes little sense. Prosecuting, indicting, finding ultimate guilt, and sentencing criminal defendants are not the business of the police. . . .
>
> To hold that the decisions of the prosecutor, juries and judge do not break the chain of proximate causation trivializes the importance of these post-arrest decisions, which do not merely pass on the correctness of the seizure or arrest by police but which, based on all of the information available to these court officials, determine the likelihood that a potential defendant is guilty . . .

Barts v. Joyner, 865 F.2d 1187, 1196-97 (11th Cir. 1989). Here, Dr. Brown was not arrested until *after* the indictment was returned, and suffered no cognizable harm apart from that caused by immune judicial and quasi-judicial actors. As the courts of appeals to have ruled on the issue agree, it is unfair, and not supported in the common law principles of tort liability on which the Civil Rights Acts draw, to hold antecedent actors (such as Respondents) liable on these facts. *See Smiddy v. Varney*, 803 F.2d 1469, 1472 (9th Cir. 1986); *Barts v. Joyner*, 865 F.2d 1187, 1196-97 (11th Cir. 1989); *Borunda v. Richmond*, 885

F.2d 1384, 1390 (9th Cir. 1988); *Gunderson v. Schlueter*, 904 F.2d 407, 410 (8th Cir. 1990); *cf. Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (acknowledging rule that an "informed" decision by prosecutor, grand jury, or judge will "shield a police officer"). To the extent the Supreme Court of Hawaii applied this rule developed in the federal courts to § 1983 actions brought in the Hawaii state courts, *see Bullen v. DeRego*, 68 Haw. 587, 724 P.2d 106 (1986), *cert. denied*, 480 U.S. 939 (1986), and *Brown I*, Pet. App. 16-20, the judgment is sound and does not merit review.

5. Petitioner's additional claims are palpably improper candidates for certiorari. The four remaining "counts" of the Complaint invoke causes of action which arise solely under state law.[6] Accordingly, the judgment below upon the state law claims rests on "independent

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[6] Although Respondents had involved federal preemption defenses to those causes of action, based on the argument that Congress would not intend inhibition of the discretionary functions executed by the federally financed Medicaid Fraud Correction Units, *cf. Ferri v. Ackerman*, 444 U.S. 193, 198 n.13 (1980), there is nothing in the opinions of either the trial court or the Supreme Court of Hawaii that indicate that such defenses were accepted. Petitioner's argument that such a defense is unmeritorious on these facts is unpersuasive even if the Court must reach it. Respondents not only were entitled to complete immunity from the asserted state claims, *compare* Pet. at 12, and *Westfall v. Erwin*, 484 U.S. 292 (1988), *with, e.g., Gray v. Bell*, 712 F.2d 490 (D. C. Cir. 1983), at the very least they could be no worse off than with respect to their federal claims, since, at the least, "the express language, the history, [and] the basic purpose" of the Social Security Act require federal immunity. *See Ferri*, 444 U.S. at 198 n.13.

and adequate state grounds," and is not reviewable in this Court. *See Murdock v. Memphis*, 89 U.S. (20 Wall.) 590, 636 (1875). The state courts acted well within their discretion in framing the causes of action which Petitioner invoked and the immunities applicable thereto under state law in such a fashion as to deny Petitioner any relief on those claims. *See Martinez v. California*, 444 U.S. 277, 282 (1980). The judgment below is in turn well in accord with the policy-oriented principles of Hawaiian tort law. *See Hayes v. Nagata*, 68 Haw. 662, 730 P.2d 814 (1986). Indeed, the plain probable cause to indict Dr. Brown, reinforced by the effect of the rulings in the criminal case, precluded any tort remedy under any recognized ground of tort recovery in Hawaii. *See e.g., Myers v. Cohen*, 67 Haw. 389, 391, 688 P.2d 1145, 1148 (1984) (malicious prosecution); *Wong v. Panis*, 772 P.2d 695, 700-01 (Haw. App. 1989) (emotional distress); *State v. Wyatt*, 67 Haw. 293, 687 P.2d 544 (1984) (invasion of privacy). Finally, Petitioner's allegation that the state courts acted unconstitutionally in depriving her of additional discovery is not well founded. Not only was this claim not well preserved in the state trial court, the claim is unmeritorious on its own terms. As this Court has repeatedly emphasized, in cases such as this, where legal defenses (such as immunity) are implicated, " 'discovery should not be allowed.' " *Siegert v. Gilley*, 59 U.S.L.W. at 4467. Moreover, Petitioner had more than ample discovery, and failed to take advantage of available avenues of discovery that were not foreclosed by the state courts. Not only was she able to rely upon the extensive evidence adduced at her criminal trial under compulsion of the Confrontation Clauses; in addition, Petitioner was free to review the public record, and

to depose or subpoena private witnesses to support her claims. That she failed to do so, or did not prevail on the record she developed is no indication that the process by which judgment entered below was unconstitutional. *See, e.g., Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 483 (1982). The partial limitation of party discovery was hardly a deprivation of Petitioner's right to litigate her claims fairly in the state courts, and is well-supported by the long-standing discretion all courts properly enjoy to manage the conduct of cases before them. Much of the jurisprudence of Federal Civil Rule 56 would be rendered unconstitutional under the theory advanced by Petitioner. *See, e.g., Paul Kadair, Inc. v. Sony Corp.*, 694 F.2d 1017 (5th Cir. 1983). Substantial additional discovery was provided to Petitioner, and Petitioner's Hawaii Civil Rule 56(f) affidavit only conclusorily alleged that the information sought in Petitioner's shotgun discovery requests was "important to the resolution of the issues before the Court." As in many cases decided under Federal Civil Rule 56(f), it was Petitioner's duty, at a very minimum, to "make more clear what information [s]he [wa]s seeking and how it would preclude summary judgment." *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986). This, she did not do. There was plainly no federal error in the disposition of the questions raised below.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX "A"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In the Matter of the Proceedings of the Grand Jury, First Circuit, State of Hawaii, for the January 1986 Term, in re:	Subsequently numbered as:
STATE OF HAWAII	Cr. No. 86-1082
vs.	
Carol A. Brown, M.D., Defendant.	

TRANSCRIPT OF PROCEEDINGS

had before the Grand Jury, First Circuit, State of Hawaii, Wednesday, September 17, 1986, on the Partial Report.

APPEARANCES:

MS. MILDRED TAAM,	Foreman, Grand Jury.
PETER L. YEE, ESQ. Deputy Attorney General, State of Hawaii.	For the State of Hawaii
	Independent Counsel, Grand Jury.

AILEEN N. SYLVA, CSR #190
Honolulu, Hawaii

INDEX OF WITNESSES

THEODORE HIROTSU 3

CAROL TAKANO 7

SADIE KOBAYASHI 12

KATHRYN BUCKLEY 16
ADDIE FARR 24
DONALD WONG 26
JOHN GESANG 29
FELILA ALCARION 31
SOON YANG 33
LINA BELLEN 35
BETTY JANE KAM 28
PATRICIA DRAKE 40
JENNIFER KEAO 41
ANNA SILVA 43
SANDRA BROWN 44
JONI WILSON 47
CAROL TAKANO 48

Wednesday, September 17, 1986.
1:40 p.m. Session.

[p. 2] MR. YEE: Good afternoon, ladies and gentlemen of the Grand Jury. I'm Peter Yee, Deputy Attorney General, representing the State.

Let the record reflect that also present with me is Deputy Attorney General Jaurene R. Judy.

The members of the Grand Jury have all been given a copy of the proposed indictment. Has everyone had an opportunity to read the verbage of the proposed indictment?

THE FORE PERSON: Yes.

MR. YEE: Let the record reflect that no one has indicated that they have not had an opportunity. At this time, Madam Fore Person, I will hand you a copy of the original of the proposed indictment. The substance of these offenses charged against Dr. Carol A. Brown relate to her submitting claims to the Medical Assistance Program of the State of Hawaii for 50 minute psycho-therapy sessions when in fact the psycho-therapy sessions that she had with the named patients lasted for 30 minutes or less.

Counts 1. to 125. all involve out-patient invididual psycho-therapy sessions. Counts 126 through 133. involve in-patient pyscho-therapy sessions. Count 134. is a course of conduct count dealing with out-patient psycho-therapy sessions as to a particular medicaid patient.

[p. 3] We will call as our first witness, Mr. Theodore Hirotsu.

THE FORE PERSON: Stand and raise your right hand, please. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE FORE PERSON: Be seated.

THEODORE HIROTSU

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Good afternoon, Mr. Hirotsu. Would you state your full name for the record, please?

A. My name is Theodore Hirotsu.

Q. How are you presently employed, sir?

A. I am with the Department of Social Services, Health Care Administration Division.

Q. What does the Health Care Administrative Division of DSSH do?

A. We are the agency that runs the medicaid program.

Q. Is that also referred to as the Medical Assistance Program?

A. That's right.

[p. 4] How is the Medical Assistance Program funded?

A. Well, it's a Federal-State, 50 percent from the Federal and 50 percent from the State.

Q. And what does the Medical Assistance Program provide?

A. It provides a variety of services like in-patient hospital care, out-patient care, physician's services, skilled nursing facility services, intermediate care facilities, dental services and some others.

Q. Do the funds, let me ask you this. How does one become a medicaid provider?

A. The person who wants to participate in our program will either write or call the Health Care Administration Division, the contract branch, and the personnel from the contract branch will send them the application form.

Q. Okay. Is there a provider by the name of Carol A. Brown?

A. Yes, there is.

Q. When did she become a provider?

A. She became a medicaid provider effective July 28, '78, '77 or '78, '78.

Q. In 1978?

A. 1978.

Q. Okay. When a person become a medicaid provider, does the Department of Social Services and Housing provide [p. 5] them with any kind of guidance?

A. Yes. We do have what we call the medicaid rules and regulations and also the HMSA Medicaid sends out information on our program.

Q. You mentioned HMSA. How does HMSA relate to the Medical Assistance Program?

A. They are our fiscal agent. They make out the payment to the provider.

Q. Okay. Is this by contract?

A. Yes.

Q. Then who handles the claims processing for Medicaid?

A. HMSA Medicaid.

Q. So they handle the claims processing and payment?

A. Yes.

Q. Are any payments made directly to the recipients?

A. No.

Q. They are only made to participating providers?

A. Yes.

Q. Mr. Hirotsu, are the, is psycho-therapy services, are psycho-therapy services reimbursable services under the Medicaid program?

A. Psycho-therapy, yes.

Q. Are there any rules and regulations that pertain to reimbursements of psycho-therapy or for psycho-therapy [p. 6] services? Are there any rules and regulations which govern when and under what circumstances psycho-therapy services can be reimbursed to the provider?

A. Yes. Visits to the office or Mental Health Clinics and there should be personal contact with the patient.

Q. Do the rules and regulations require that they have personal contact with the patient?

A. Yes.

Q. Was that information provided to Dr. Brown and if so, in what form?

A. That I'm not sure. I did assume that it was sent out through the HMSA Medicaid form, news letter.

Q. Okay. She would, as a participating provider, she would also get a copy of the provider manual, is that correct?

A. Not the provider manual per se.

Q. The physicians don't get a provider manual?

A. Oh, yes, I'm sorry. I misunderstood. They do receive a provider manual, yes.

Q. Was a provision in the provider manual that, was there a provision in the provider manual which informs psychiatric providers that the program requires face to face contact or personal contact?

A. I'm sorry. I haven't seen the latest or current [p. 7] physician's provider manual.

Q. How about the provider manual that was in effect at the time that Dr. Brown became a medicaid provider?

A. Again I am not sure but I believe, I assume there is one.

Q. Thank you, Mr. Hirotsu. I have no further questions. Are there any questions from the members of the panel?

THE FORE PERSON: No questions.

MR. YEE: There appear to be none. Thank you, sir.

The next witness is Mrs. Carol Takano.

THE FORE PERSON: Please stand and raise your right hand. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE FORE PERSON: Be seated.

CAROL TAKANO

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Good afternoon, Mrs. Takano. Would you please state for the record, your full name?

A. Carol Takano.

[p. 8] Q. How are you presently employed?

A. I'm employed at HMSA, the Hawaii Medical Services Association.

Q. What is your duty title?

A. I am the manager of the Medicaid Department.

Q. What are your duties as the manager of the Medicaid Department?

A. We are responsible for processing all of the medicaid claims and communicating with the providers.

Q. Okay. What is your relationship with the Department of Social Services and Housing, Health Care Administration Division?

A. We have a contract with them to process all the claims and communicate with the provider.

Q. Okay. When you say that you process the claims, what does that entail?

A. Well, it entails receiving the claim from the provider. We assign a unique claim number to each claim, microfilming it. Having it data entered on to a tape, fed into the computer, run against several edits to make sure that the claim can be paid for and then cutting of a check to the provider.

Q. Are there mechanisms in place to determine whether or not a claim is false or fraudulent claim?

A. There is, I'm not quite clear on your question [p. 9] because there are edits or mechanisms in place to check that the provider is certified under the program, and the patient is eligible, and that the codes they use or services rendered are covered under the program. But as to whether the, each and every service on the claim is true or that we investicate each one, no.

Q. So in other words, if a claim comes in to HMSA and it appears facially correct, in other words, it's an eligible recipient, there is an eligible provider, and it is coverable, reimbursable service, unless there is something else wrong with it, the claim would be paid, is that correct?

A. Yes.

Q. About how many claims are processed through HMSA per month?

A. About 150,000 claims.

Q. How is a medicaid claim generated? Who generates the medicaid claim?

A. Well, the patient or the recipient goes to a provider of service. The provider then submits the claim to HMSA.

Q. Okay, So it would be the provider –

A. Sending in the claim.

Q. Okay. What kinds of information is on the claim form?

[p. 10] A. The patient's name, the patient I.D. number, the provider's name, the provider's I.D. number. There is a service date, the type of service they are billing for and the charge.

Q. Is there a place on the claim form for a signature?

A. Yes, there is.

Q. What is the significance of the signature?

A. Well, the provider, because we receive so many claims per month, we are not able to verify each and every claim with the provider's records. So the provider has to sign each claim form to attest that the information that he is billing there is true, accurate and complete, and that any false records or documents can be prosecuted under applicable State and Federal laws.

Q. Okay. When you indicated that among the information that is on the claim form the nature of the service rendered, how is the, how is that indicated?

A. It is indicated by what we call procedure code. Sometimes they, with the procedure code they actually tell us what was rendered also.

Q. Okay. And the procedure code relates to a specific type of service that is rendered?

A. Yes.

Q. Now, once you have run your claim through the HMSA edits that you mentioned, what then happens?

[p. 11] A. And the claim is payable, then the check is made out to the provider along with what we call a remittance advice that lists all the claims or people we are paying for within that check.

Q. Now, in the course of your duties, did you, do do you have the occasion to review and become familiar with the rules that pertain to the medicaid program?

A. Yes.

Q. Did you become, areyou familiar with the rules that pertain to reimbursement for psycho-therapy services?

A. Yes.

Q. What, if anything, do those rules say about a physician or psychiatrist having personal contact with a patient for psycho-therapy?

A. It defines a psycho-therapy visit as being a person to person contact between the physician and the patient.

Q. Okay. Now, you mentioned some procedure codes. With regard to psycho-therapy sessions, are there

specific procedure codes which indicate how long the psycho-therapy sessions last?

A. Yes. There are different codes for the different times.

Q. If the time that was spent with the particular patient on any given day was less than that which was [p. 12] claimed on the claim form, would that claim be true or false?

A. It would be false.

Q. Okay. Mrs. Takano, that's all the questions I have for you at this moment. I will be calling you back again towards the end of the presentation.

Are there any questions for Mrs. Takano by the grand jury?

THE FORE PERSON: No questions.

MR. YEE: There appear to be none. Thank you, Mrs. Takano.

My next witness will be Ms. Sadie Kobayashi.

THE FORE PERSON: Please stand and raise your right hand. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE FORE PERSON: Be seated.

SADIE KOBAYASHI

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Good afternoon, Ms. Kobayashi. Would you please state your name for the record?

[p. 13] A. My name is Sadie Kobayashi.

Q. Do you know an individual by the name of Dr. Carol A. Brown?

A. Yes.

Q. How is it that you knew her?

A. I was employed by her for two years.

Q. For two years. During what period of time?

A. '81, mid '81, '82. No, '82 and '83.

Q. '82 and '83?

A. Yes.

Q. What were your duties when you worked for Mrs., Dr. Brown?

A. I worked as a receptionist.

Q. In so doing, did you have occasion to prepare claims for Dr. Brown?

A. Yes.

Q. How were these claims prepared? Would you tell us what procedures you did to prepare or to generate a claim?

A. Basically just filling in the basic information like name and the insurance number, the procedure that they

were coming in or scheduled for and the description of the procedure, including the dollar amount for that particular time.

Q. Okay. Were these claims prepared before or after [p. 14] Dr. Brown saw the patients?

A. Before.

Q. For psycho-therapy claims, let me back up a little bit. Did you ever prepare medicaid claims for Dr. Brown?

A. Yes.

Q. About what percentage of her business was medicaid?

A. I would say about 80 percent.

Q. When you prepared a medicaid claim, what length of time would you typically put down as the length of service?

A. I believe it was 50 minutes.

Q. Almost all of them?

A. Majority of them, yes.

Q. What would happen to these pre-prepared claims?

A. They would be attached to the chart and she would take them in at the start of her day.

Q. Okay. And as she saw the patients, then what would happen?

A. She would sign them and make any corrections to them and return them.

Q. Okay. Were there ever occasions where you prepared a claim that indicated that there had been a 50 minute psycho-therapy session when in fact the patient was only in to see the doctor for 12 or 20 minutes?

A. Uh huh.

[p. 15] Q. Is that a yes?

A. Well, yes. Because all of the claims were prepared for 50 minutes and if she saw them for a lesser amount of time, then it was up to her to change it.

Q. Did they ever come, did she ever change those times?

A. A few.

Q. A few?

A. Uh huh.

Q. Would you say the majority of the occasions she did not?

A. Correct.

Q. When you got the claim back from Dr. Brown at the end of the day or the next day, were those claims signed?

A. Yes.

Q. By whom?

A. By Dr. Brown.

Q. How long were you aware that Dr. Brown was submitting the 50 minute claims for shorter sessions?

A. I was aware of it for a period of time but I never questioned it because there were times that she saw patients and I was not there.

Q. Okay. But you do know of occasions where she submitted a claim for 50 minute psycho-therapy sessions when in fact the actual session was less?

[p. 16] Yes.

Q. Did this occur often?

A. Pretty much, uh huh.

Q. Did you ever confront Dr. Brown with this?

A. A couple of times, yes.

Q. What did she say in response to that?

A. Her response was it was justified because she had spent some time with the client over the phone at night or because she had to complete various reports for them and that took up time.

Q. Okay. Thank you, Ms. Kobayashi. I have no further questions for you. Does the grand jury have any questions for Ms. Kobayashi?

THE FORE PERSON: No questions.

MR. YEE: There appear not to be. Thank you.

My next witness is Ms. Kathryn Buckley.

THE FORE PERSON: Please stand and raise your right hand. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE FORE PERSON: Be seated.

KATHRYN BUCKLEY

called as a witness, being first duly sworn on oath, was examined and testified as follows:

[p. 17] DIRECT EXAMINATION

Questions by MR. YEE:

Q. Ms. Buckley, would you state your full name for the record, please?

A. Kathryn Hoxley Buckley.

Q. Thank you. Do you know an individual by the name of Dr. Carol A. Brown?

A. Yes, I do.

Q. And how do you know her?

A. I was employed by her.

Q. How long were you employed, and during what period of time?

A. May '84 to January '86, a year and 8 months.

Q. Okay. What were your duties while you were employed by Dr. Brown?

A. Secretary-receptionist.

Q. And what sorts of things did you do as a secretary-receptionist?

A. I set up all her appointments, did her correspondence, typed her medical reports, did the billing, submit the claims.

Q. Okay. Did you also prepare the claims for Dr. Brown.

A. Yes, I did.

Q. What were the procedures that you followed in the preparation of claims?

[P. 18] A. I would pull the charts and the ledger the evening before their appointment, and I would type up the claim the night before or if I didn't get to it, I would do it that day before the patient came in and everything was typed on the claim except the date of service.

Q. Okay. Everything including the length of time?

A. Yes.

Q. What did you typically put down for the length of time?

A. 50 minutes.

Q. What would happen with the claim once the patient came in?

A. The claim was given to Dr. Brown at the end of the day, all the claims were given to her at the end of the day to sign.

Q. I see. And did she, when would she sign the claims?

A. She would sign them that evening or, well, usually that evening. Some times she would do it the next

day when she came in. She had a basket and I put them in her basket before I left at night.

Q. Okay. And what would you do with the claims once she had signed them?

A. She would give them back to me and I would separate them and mail them out. Before that, I would post them. She would make up a charge sheet every night before she [p. 19] went home with all the charges on it.

Q. Okay. Just to clarify a point. Where is Dr. Brown's office?

A. 1314 South King Street.

Q. And is that in the City and County of Honolulu?

A. Yes.

Q. State of Hawaii?

A. Yes.

Q. Okay. The claims you indicated that you had pre-typed in the hours, the time?

A. The time.

Q. And that was typically for 50 minutes, is that correct?

A. Yes.

Q. Did you ever become aware that Dr. Brown was seeing patients less than 50 minutes, for instance, 15 to 20 minutes and submitting claims for 50 minutes psychotherapy sessions?

A. Yes.

Q. When did you first notice that?

A. At the beginning of my employment.

Q. Okay. Did she ever change the numbers that you had typed on the claim form the previous night?

A. Occasionally there would be a half session.

Q. A half hour session?

A. Uh huh.

[p. 20] Okay. But would you say that the majority of the time she would not change it?

A. It was 50 minutes.

Q. Would it be the vast majority or –

A. The majority.

Q. The majority. Ms. Buckley, how about in-patient claims? How were those prepared?

A. I wouldn't do a claim until they were discharged from the hospital. Every day, as I said, she filled out a charge sheet stating what patients were seen that day, and that included in-patients and out-patients.

Q. Okay. And –

A. And I posted them on a ledger card and then when the person was discharged from the hospital that is when the claim was typed up.

Q. Okay. How long, how did you know how long she spent with the patient in the hospital or would you know?

A. Yes. She gave me the procedure code that we use for the hospital.

Q. Okay. Was the procedure code for 50 minutes psycho-therapy session?

A. Yes, in-patient.

Q. Again did you ever ask her how long she was actually spending with the patients in the hospital?

A. No.

[p. 21] Q. Did she actually ever tell you how long she spent with the patients?

A. No.

Q. You said that you also kept her appointment book, is that correct?

A. Yes, I did.

Q. Would you say that Dr. Brown had a busy appointment schedule?

A. Very busy.

Q. How close together would she schedule her appointments?

A. Every 30 minutes to every hour. If it was a new patient, I tried to leave an hour's space. On existing patients, they were for 30 minutes.

Q. Given the number of patients Dr. Brown had had on a busy day, would it have been possible for her to have seen all her patients for 50 minutes?

A. I would go home at 6 o'clock. I wouldn't know how long she stayed. As long as I was there, she could not see all her patients for 50 minutes.

Q. Now, Ms. Buckley, you employed, were you not, by Dr. Brown in November of 1985?

A. Yes.

Q. Do you recall an occasion where a search warrant was executed at the office of Dr. Brown?

[p. 22] A. Yes.

Q. Following that search warrant, did you ever have a discussion with Dr. Brown about the 50 minutes claims for 15 minutes services?

A. Yes.

Q. What was the substance of that conversation?

A. Well, she spends a lot of time with her DSSH patients and she did not seem to realize that it had to be face to face contact, that they had to be in the office for her to be billing for the 50 minute session but she would spend a lot of time on the telephone, a lot of time with other doctors about the patients, court appearances, attorney reports and achild custody cases with the attorney and she just felt that this was right.

Q. That's what she told you?

A. Yes.

Q. What percentage of her practice, Ms. Buckley, would you estimate her medicaid patients?

A. 75, 85 percent, a large part.

Q. A large part?

A. Yes, large part.

Q. Thank you, Ms. Buckley. I have no further questions. Does the grand jury have any questions?

A GRAND JUROR: I have a question. Is the dollar amount of the charge, correlate with the time that is [p. 23] specified in the billing?

A. Yes. We would use the RVS number that represented 50 minutes.

THE GRAND JUROR: So the amount charged was supposedly for 50 minutes?

A. Right.

MR. YEE: Let me follow up on that, Ms. Buckley. If you had used the RVS code or the procedure code for a 25 minute psycho-therapy session, would the reimbursement that medicaid paid be more or less?

A. Would be less that the 50 minutes. She filled out the charge sheet and she put down the amount of the, what we were reimbursed by HMSA or DSSH and telling me which one to bill for because that's what we got paid for, that is what we posted on the ledger.

MR. YEE: Okay. Are there any other questions?

A GRAND JUROR: Would you say when you were there, she sees more than two patients an hour?

A. I don't think she would see more than two patients an hour.

MR. YEE: Might she see five patients in two hours?

A. No. She would spend more time than that.

MR. YEE: Okay. Are there any other questions? There appear not to be.

My next witness is Ms. Addie Farr.

[p. 24] THE FORE PERSON: Would you stand and raise your right hand? You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE FORE PERSON: Be seated.

ADDIE FARR

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Good afternoon, Addie. Would you tell the grand jury your full name, please?

A. My name is Addie Mae Ayako Farr.

Q. Thank you. Addie, do you know Dr. Carol A. Brown?

A. Yes, I do. She's my doctor, psychiatrist.

Q. Okay. When did you start seeing Dr. Brown, about?

A. Roughly about two years ago.

Q. Okay. Do you remember your visits that you had with her last year?

A. Yes, I did.

Q. You saw her last year?

A. Right.

Q. About 11 times, something around there?

A. No.

[p. 25] Q. More?

A. Maybe about 18 times.

Q. Okay. How long were your sessions with Dr. Brown? This is for psycho-therapy sessions?

A. No. She didn't talk to me at all. All she was doing is giving me shots and making my medical history out.

Q. I see. How long did you spend with Dr. Brown when you went to see her?

A. Roughly about 15 to 20 minutes.

Q. Every time?

A. Yes.

Q. Okay. That's all the questions that I have. Are there any questions from the grand jury?

A GRAND JUROR: Yes. Do you talk to her on the telephone? Maybe at night? Does she call you at night?

A. No.

THE FORE PERSON: Okay.

MR. YEE: Thank you. The next witness will be Special Investigator Donald Wong.

THE FORE PERSON: Please stand and raise your right hand. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes, Ma'm.

THE FORE PERSON: Be seated.

[p. 26] DONALD WONG

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Special Investigator Wong, would you please state your full name for the record?

A. Donald Wong.

Q. How are you employed, sir?

A. I'm employed by the Attorney General's Office, State of Hawaii, assigned to the Medicaid Fraud Control Unit.

Q. As a Special Investigator?

A. Yes, sir.

Q. In the course of your duties, did you have an opportunity to conduct an investigation relating to a Dr. Carol A. Brown?

A. Yes, sir.

Q. During the course of that investigation, did you happen to interview a person by the name of Ronalda Barrymore?

A. Yes, sir. I did.

Q. What was it that you interviewed Ms. Barrymore regarding?

A. I asked Ms. Barrymore the length of time that she was spending in Dr. Brown's office in the therapy session.

[p. 27] Q. What period of time were you looking at?

A. From I believe it was August of 1983 up through the present time that I interviewed her, which I believe was in April of this year, 1986.

Q. Okay. What, if anything, did Ms. Barrymore tell you regarding the length of time she spent with her?

A. Ms. Barrymore stated to me that the first three or four sessions in the beginning when she went to Dr. Brown lasted for between 45 minutes and one hour. After that, her sessions became shorter and shorter. Most of her sessions according to Ms. Barrymore were between 15 and 30 minutes.

Q. What efforts have, did you cause to have prepared a subpoena for her to appear in this hearing?

A. Yes, sir, I did.

Q. What efforts have you made to secure her attendance?

A. I contacted her social worker and asked her social worker to get in touch with Ms. Barrymore. When I first interviewed her, she did not have a permanent address although she did have a p.o. box. That's how I contacted her the first time to interview her. I asked the social worker to try and contact her through the p.o. box again. He has not gotten back to me. I called him this morning and as of the time that I talked to him this morning which was about ten o'clock, Ms. Barrymore had not responded to the notice that he had sent to her p.o. box.

[p. 28] Q. And the social worker confirmed that she does not have a permanent address?

A. Yes.

Q. Thank you. During the course of your investigation into the activities of Dr. Brown, did you have an opportunity to interview a person by the name of Yvette Vanschoor?

A. Yes, sir. I did.

Q. Again what was it that you were asking Ms. Vanschoor about?

A. My primary concern, my questions directed to Ms. Vanschoor was the length of time that she spent in Dr. Brown's office in the therapy sessions.

Q. What period of time were these therapy sessions supposed to have occurred in?

A. I believe they were in 1984 and 1985.

Q. Okay. What, if anything, did Ms. Vanschoor tell you about her length of her visits?

A. Ms. Vanschoor told me that in the beginning, the first three or four visits were for approximately one hour. After that the visits became shorter and shorter. Most of them between 15 and 30 minutes.

Q. Thank you. Is Ms. Vanschoor currently under the care and treatment of a psychiatrist?

A. Yes, sir, she is.

Q. Did you have an opportunity to talk to her [p. 29] treating physician?

A. Yes, sir, I did. I talked to him.

Q. Did he express an opinion as to the effect of testifying before the grand jury on her mental health?

A. I talked to her psychiatrist the day before yesterday, and he told me that in his opinion, he did not think it would be in her best interest to testify here at the grand jury because of her mental health condition.

Q. Thank you. I have no further questions of the Investigator Wong. Are there any from the grand jury? There appear not to be. Thank you.

My next witness is John Gesang.

THE FORE PERSON: Please stand and raise your right hand. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE FORE PERSON: Be seated.

JOHN GESANG

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Mr. Gesang, would you please state your name for the record?

[p. 30] A. John Stanley Gesang.

Q. Mr. Gesang, do you know an individual by the name of Dr. Carol A. Brown?

A. Yes.

Q. And how is it that you know her?

A. I was referred to her by my cousin.

Q. Okay. Is she your psycho-therapist?

A. She was.

Q. She was. When did you first start seeing her?

A. I would say early in 1983.

Q. Okay. How long were your sessions with Dr. Brown?

A. Usually between 10 and 15 minutes.

Q. Were there, was there ever an occasion where you were in there for 45 minutes to an hour?

A. Maybe one or two occasions.

Q. And when would those occasions have been? Do you recall?

A. Late 1984, early 1985, I can't recall.

Q. So December 1984 or January 1985?

A. Uh huh.

Q. Is that correct?

A. Yes.

Q. All the rest of them were 10 or 15 minutes, is that correct?

A. Yes.

[p. 31] Thank you, Mr.Gesang. That's all the questions I have.

A. Okay.

Q. Any questions form the grand jury?

THE FORE PERSON: No questions.

MR. YEE: Thank you. The next witness we'll call is Felila Alcarion.

THE FORE PERSON: Stand and raise your right hand.

You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE FORE PERSON: Be seated.

FELILA ALCARION

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Good afternoon, Ms. Alcarion. Would you, for the record, state your name, please?

A. Felila Alcarion.

Q. Were you ever known as Dela Pina?

A. Yes.

Q. Do you know an individual by the name of Dr. Carol A. Brown?

[p. 32] A. Yes.

Q. How do you know her?

A. She was my psychiatrist at one time.

Q. When did you, during what period of time were you seeing Dr. Brown?

A. It was last year so it's hard for me to really get the exact date but I know it was from the month of June to November.

Q. Okay. Would you see Dr. Brown for individual psycho-therapy services?

A. Yes.

Q. How long were your visits with Dr. Brown?

A. You mean how long it lasted?

Q. Yes. How long did they last?

A. You want the average or you want, what I'm saying is you want, like you want me to make an average of the time you know, what I mean life if I have 10 or 7, well, it's about 10 or 15 minutes.

Q. Did any of them last 45 minutes, 50 minutes?

A. No.

Q. That's all the questions I have.

A GRAND JUROR: Did she ever call her sessions on the phone with you?

A. No.

MR. YEE: There appear to be no further questions.

[p. 33] A GRAND JUROR: I have a question. Were you ever aware that she was charging you for 50 minutes?

A. 50 minutes? As a matter of fact, no. When I was approached by Mr. Wong, Donald Wong, when I was going to school, he said a lady called in and said that she got an HMSA paper saying that Dr. Carol Brown was charging her for an hour, and that she was just giving him, I mean the time that she was giving her was just 15 minutes and that is the same with me. I thought everybody was like that, she was charging 15 minutes for everybody else.

MR. YEE: Any further questions?

THE FORE PERSON: No questions.

MR. YEE: Thank you very much.

A. Welcome.

MR. YEE: The next witness will be Soon Yang.

THE FORE PERSON: Will you stand by the chair and raise your right hand. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes, I going tell the truth.

THE FORE PERSON: Would you sit down, please.

SOON YANG

called as a witness, being first duly sworn on oath, was examined and testified as follows:

[p. 34] DIRECT EXAMINATION

Questions by MR. YEE:

Q. Ms. Yang, what is your name?

A. Soon Chin Yang.

Q. Do you know an individual by the name of Dr. Carol A. Brown?

A. Yes.

Q. How do you know her?

A. I was being her patient.

Q. Okay. Do you remember when you were seeing Dr. Brown?

A. I cannot remember.

Q. Did you see Dr. Brown last year?

A. Yes.

Q. Okay. How long were your sessions with Dr. Brown? How many minutes did they take?

A. Some time 40 minutes but I don't count the time. So I cannot say exactly but some time 40 minutes, some time 20 minutes, 15 minutes, 30 minutes. So I can say maybe 25 minutes, you know, something like that.

Q. Okay. I have no further questions. Are there any from the grand jury?

THE FORE PERSON: No.

MR. YEE: Thank you, Ms. Yang. The next witness is Lina Bellen.

[p. 35] THE FORE PERSON: Will you stand and raise your right hand, please. Will you stand? Raise your right hand. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Okay.

THE FORE PERSON: Will you tell the truth?

THE WITNESS: The truth.

THE FORE PERSON: Be seated.

THE WITNESS: Okay. Ready.

LINA BELLEN

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Before I get started with you, I want to preface this for the grand jury. Her testimony will relate to Counts 94 to 108 and 130 to 131. Lina, would you give us your full name, please?

A. My name is Lina Leinaala Bellen. 24.

Q. That's all. Do you know a Dr. Carol A. Brown?

A. Yes.

Q. How do you know her?

A. I met her with my mom at Queen's Physicians Building and then I started visiting her at her office on [p. 36] King Street, First Interstate Ban.

Q. Okay. Did you ever see Dr. Brown for individual psycho-therapy sessions?

A. How many sessions?

Q. Just individual psycho-therapy sessions?

A. Yes.

Q. During what period of time have you been seeing her? When did you start seeing her for individual out-patient sessions?

A. For outside?

Q. Yes.

A. When?

Q. When did you start?

A. When I got out the hospital.

Q. When was that?

A. When? Was just before school.

Q. So it would be around September, October?

A. Yes.

Q. Of what year? Do you remember? '84?

A. '84.

Q. Okay. How long were your sessions with Dr. Brown?

A. Well, for an hour about two or three times.

Q. The first, when? The first couple of times?

A. When I first started seeing her.

Q. Okay. How long did they last after that?

[p. 37] Oh, about half an hour if not, 15 minutes.

Q. Okay. Now, you mentioned that you were in the hospital. Did Dr. Brown visit you while you were in the hospital?

A. She didn't visit me. She was visiting somebody else. She said she'll catch me later. I said, okay. I didn't want to see her anyway.

Q. So she didn't stay around you very long?

A. No. She didn't see me at Castle. Some other doctor was supposed to see me.

Q. But she popped in and said hello?

A. She said, hi, once.

Q. Thank you, Lina. Are there any questions from the grand jury?

A GRAND JUROR: Did she charge you for the visits in the hospital? Did she charge you for the visits in the hospital?

A. For the visit in the hospital?

THE GRAND JUROR: Yes.

A. I don't think so. She shouldn't. I didn't see her.

MR. YEE: You were on, you're on medicaid, right? You receive medicaid assistance?

A. HMSA welfare.

MR. YEE: Right. Do you have to pay any money [p. 38] to the providers?

A. No. I didn't have to pay. Welfare.

Q. That's all the questions I have. Thank you.

A. Pau?

THE FORE PERSON: Yes.

MR. YEE: Betty Jane Kam.

THE FORE PERSON: Stand by the chair and raise your right hand, please. You do solemnly swear or affirm that the evidence which you shall give before the

grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE FORE PERSON: Be seated.

BETTY JEAN KAM

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Ms. Kam, would you state your name, please?

A. Betty Jane Kam.

Q. Do you know an individual by the name of Dr. Carol A. Brown?

A. Yes, I do.

Q. How is it that you know her?

A. From the Castle Hospital.

[p. 39] Okay. Did you see Dr. Brown in her office on King Street?

A. Yes, I did.

Q. About how many times did you see her there?

A. Oh, maybe twice a month or I don't really know because I forget fast the pills they gave me.

Q. When was that?

A. In 1984.

Q. How long did you stay, how long were your sessions with Dr. Brown? How long did they last?

A. They last only 15 minutes or 20 minutes.

Q. All of them?

A. Yes.

Q. Okay.

A. I would have to wait in her office for about half an hour and then she sees me in 15 minutes, just write out the prescription, bang, zoom, and out.

Q. Thank you. Are there any questions from the members of the grand jury?

THE FORE PERSON: No questions.

MR. YEE: Thank you. Patricia Drake.

THE FORE PERSON: Will stand by the chair and raise your right hand. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE FORE PERSON: Be seated.

PATRICIA DRAKE

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Good afternoon, Ms. Drake. Would you please state your name for the record?

A. Patricia Drake.

Q. Do you know a Dr. Carol A. Brown?

A. Yes.

Q. How is it that you know Dr. Brown?

A. I called her to make an appointment upon the recommendation of another physician that I had called.

Q. When was it that you started seeing Dr. Brown?

A. I don't have the dates. It was about '83.

Q. In about 1983?

A. Uh huh.

Q. When you went to see Dr. Brown, how long did your visits last?

A. In the beginning, they were very short. When I first started going to see her, 10 or 15 minutes.

Q. Did they ever last 45 minutes to 50 minutes

[p. 41] A. Yes, sometimes. But I want to say that I'm not certain I was on welfare at the time but the visits were 10 or 15 minutes. I'm not certain of that. Because I went to see her to get on welfare, and so those visits might have been before I was on welfare, the short visits, but some times they were longer, later on.

Q. How much later on?

A. Maybe in about a month or so. They got longer. Then I stopped seeing her.

Q. Okay. I have no further questions. Are there any questions from the members of the grand jury?

A GRAND JUROR: When you say longer, how was, what was the longest session you had?

A. They were about 45 minutes.

MR. YEE: No further questions.

Jennifer Keao.

THE FORE PERSON: Please stand by the chair and raise your right hand. You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE FORE PERSON: Be seated.

JENNIFER KEAO

called as a witness, being first duly sworn on oath, was [p. 42] examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Good afternoon, Jennifer. Would you please state for the record your full name?

A. Jennifer Ann Keao.

Q. Jennifer, do you know an individual by the name of Dr. Carol A. Brown?

A. Yes, I do.

Q. How is it that you know her?

A. She admitted me into Castle Hospital.

Q. While you were in Castle Hospital, did she visit you there?

A. Yes, she did.

Q. How long were her visits with you?

A. Anywhere up to 15 minutes.

Q. Did they ever last 45 minutes to 50 minutes?

A. No.

Q. I have no further questions. Are there any questions from the grand jury?

THE FORE PERSON: No questions.

MR. YEE: There appear to be none. Thank you.

Anna Silva.

THE FORE PERSON: Stand and raise your right hand, please. You do solemnly swear or affirm that the evidence [p. 43] which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE FORE PERSON: Be seated.

ANNA SILVA

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Good afternoon, Ms. Silva.

A. Good afternoon.

Q. Would you state your full name for the record, please?

A. Anna Basque Silva.

Q. Thank you. Do you know a Dr. Carol A. Brown?

A. Yes.

Q. How do you know her?

A. I was a patient of hers for a very short time.

Q. Was that while you were hospitalized?

A. Yes.

Q. And was that, did she ever visit you while you were in the hospital?

A. Yes.

Q. How long were her visits with you?

A. The longest was about 20 minutes; the shortest about [p. 44] five minutes.

Q. Did she ever say with you 45 minutes to 50 minutes?

A. Not even close.

Q. I have no further questions of this witness. Are there any from the grand jury?

THE FORE PERSON: No questions.

MR. YEE: Thank you very much.

Sandra Brown.

THE FORE PERSON: Will you stand by the chair and raise your right hand, please? You do solemnly swear or affirm that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE FORE PERSON: Be seated.

SANDRA BROWN

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Ladies and gentlemen of the Grand Jury, the testimony of this witness will relate to Count 129 and Count 134. Ms. Brown, would you state your name for the record, please?

A. Sandra Lynn Brown.

[p. 45] Q. Do you know an individual by the name of Dr. Carol A. Brown?

A. Yes.

Q. How is it that you know her?

A. She was my psychiatrist.

Q. Did you see Dr. Brown at her office on King Street?

A. I seen her so long ago. I think her office was, it's not her new office. It was her old office.

Q. Queen's Medical Building?

A. I don't know if it's King Street or not.

Q. Okay. Was it in Honolulu?

A. Yes, it was Honolulu. I think it was King Street. You're right.

Q. Did you see Dr. Brown from about say December of 1983 to May of 1984?

A. Yes.

Q. When you went to visit her, how long did your sessions with Dr. Brown last?

A. About 15 minutes to a half hour, depending. Sometimes shorter.

Q. You don't know which ones of your visits were the shorter visits?

A. No. But several.

Q. Okay. Did you also, were you ever hospitalized?

A. Yes, in Kekela.

[p. 46] Q. Okay. Did Dr. Brown come and visit you while you were in the hospital?

A. I think maybe twice at the most. That was my main complaint. She never came to see me. I was there for five days. I saw her I think twice.

Q. Okay. How long did she spend with you when she did come to see you?

A. About ten minutes, 15 minutes.

Q. Did she ever spend 50 minutes with you?

A. 50?

Q. Yes.

A. Maybe a couple of times.

Q. While you were in the hospital?

A. Oh, no.

Q. Thank you, Ms. Brown. I have no further questions. Are there any from the grand jury?

THE FORE PERSON: No questions.

MR. YEE: The next witness is Joni Wilson. Can we take a brief recess?

(A recess was taken at 2:40 p.m.)

(Hearing resumed at 2:47 p.m.)

MR. YEE: Joni Wilson, please.

THE FORE PERSON: Will you stand by the chair? Stand and raise your right hand, please? You do solemnly swear or affirm that the evidence which you shall give [p. 47] before the grand jury shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE FORE PERSON: Be seated.

JONI WILSON

called as a witness, being first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Good afternoon, Ms. Wilson. Would you state your full name for the record, please?

A. Joni Mapuana Wilson.

Q. Ms. Wilson, do you know an individual by the name of Dr. Carol A. Brown?

A. Yes.

Q. How do you know her?

A. She was my psychiatrist at the time I was at Castle Hospital and Kekela.

Q. Did Dr. Brown visit you while you were in the hospital?

A. Yes.

Q. How long did she visit you for?

A. At the time she visited me at Castle, it was for about 20 minutes.

Q. Okay. How about at Kekela?

[p. 48] A. When I was at Kekela, she saw me a couple of times and on few occasions it was about 15 minutes.

Q. Okay. Thank you, Ms. Wilson. I have no further questions of you. Are there any questions from the members of the grand jury? There appear to be none.

Thank you.

Call Carol Takano.

CAROL TAKANO

recalled as a witness, being previously sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

Questions by MR. YEE:

Q. Mrs. Takano, you are still under oath. Mrs. Takano, during, in preparation for today's presentation, did you have an opportunity to view the proposed indictment?

A. Yes, I did.

Q. Which consisted of 134 counts?

A. Yes.

Q. Did you compare them against records of HMSA Medicaid to determine whether or not claims were submitted on those dates alleged in the indictment?

A. Yes.

Q. Were all the claims, was there a claim for each of the dates alleged in the indictment?

A. Yes, there were.

[p. 49] Q. Did each of the claims claim 50 minutes psychotherapy sessions?

A. Yes.

Q. Going through the claims, did you determine that Addie F. was in fact Addie Farr?

A. Yes.

Q. Kathryn, excuse me. Ronalda B. is Ronalda Berrymore?

A. Yes.

Q. Yvette Vanschoor, Yvette V. was Yvette Vanschoor?

A. Yes.

Q. John G. is John Gesang?

A. Yes.

Q. Belila D. is Belila Dela Pira?

A. Yes.

Q. Soon Y. is Soon Yang?

A. Yes.

Q. Lina B. is Lina Bellen?

A. Yes.

Q. Betty Jane K. is Betty Jane Kam?

A. Yes.

Q. Patricia D. was Patricia Drake?

A. Yes.

Q. Jennifer Keao, K. was Jennifer Keao?

A. Yes.

[p. 50] Q. Anna S., Anna Silva?

A. Yes.

Q. Sandra B. for Sandra Brown?

A. Yes.

Q. And Joni W. is Joni Wilson?

A. Yes.

Q. Were each of these claims, what is the difference between, what would Dr. Brown have been reimbursed for a 50 minute psycho-therapy session?

A. $47.70 plus tax.

Q. What would she have been reimbursed for a 25 minute psycho-therapy session?

A. $27.83, plus tax.

Q. So the difference of about $22?

A. Yes. Added up to about 21.

Q. Per claim?

A. Yes.

Q. Were actually –

A. Per visit.

Q. In fact, some of the claims had more than one service date?

A. Yes.

Q. Alleged?

A. Yes.

Q. And that was particularly true with the in-patient. [p. 51] is that correct?

A. Yes.

Q. I have no further questions of Ms. Takano.

A GRAND JUROR: There are occasions when some professional people would charge block, whether they see a person for 5 minutes ot 50 minutes. Could this have been the case for Dr. Brown?

A. No. The code or it has to be specific as to how long the sessions were.

A GRAND JUROR: How close are they broken down in? 5 minute intervals?

A. No. 15 minutes, half an hour but for psychiatric services, the half hour is really 25 minutes and the one hour sessions are usually 50 to 55 minutes.

A GRAND JUROR: You say she can report the 15 minutes or the half hour?

A. If the session was 15 minutes, it should have been reported as the 15 minute session with a different code because the payment would have been a lot less.

THE GRAND JUROR: I see. So she could have reported 15, half an hour, or an hour, is that right?

A. Yes.

MR. YEE: I have a follow up questions. Is there any provision under the Hawaii Medical Assistance Program for reimbursing psychiatrists for telephone calls?

[p. 52] A. No, there is not. Telephone calls are not a benefit under the program.

MR. YEE: How about doing paper work?

A. No. That's part of what she is getting paid for the visit itself. They don't get paid extra for filling out that paper.

MR. YEE: Thank you. I have no further questions of Ms. Takano.

Ladies and gentlemen of the grand jury, that concludes my presentation.

* * *

APPENDIX "B"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CAROL A. BROWN, M.D., Plaintiff, vs. DONALD WONG; CLYDE VIERRA; FRANKLIN Y.K. SUNN; EARL MOTOOKA; THE STATE OF HAWAII; DEPARTMENT OF HUMAN SERVICES, formerly the Department of Social Services and Housing of the State of Hawaii; JOHN DOES 1 through 10; DOE CORPORATIONS 1 through 10; and DOE UNINCORPORATED ASSOCIATIONS, INCLUDING PARTNERSHIPS 1 through 10, Defendants.	Civil No. 88-2370-07 AFFIDAVIT OF STEVEN S. MICHAELS AND EXHIBITS "A" THROUGH "J" [Filed May 16, 1989] NON-HEARING MOTION TRIAL WEEK NOT SET

AFFIDAVIT OF STEVEN S. MICHAELS AND EXHIBITS "A" THROUGH "J"

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

Steven S. Michaels, being first sworn on oath, deposes and says:

1. I am a Deputy Attorney General and am counsel for the Defendants herein.

2. Attached in order, are true copies of the following:

"A" Indictment, CR. No. 86-1082 (Haw. Cir. Sept. 17, 1986).

"B" Order Denying Motion to Dismiss Indictment, CR. NO. 86-1082 (Haw. Cir. Apr. 1, 1987);

"C" Order Denying Motion to Suppress, CR. No. 86-1082 (Haw Cir. Apr. 1, 1987);

"D" Transcript of Proceedings, April 29, 1987, CR. No. 86-1082 (Haw. Cir. Apr. 29, 1987);

"E" Stipulation for Dismissal Without Prejudice, No. 87-0694 (D. Haw. lodged Aug. 25, 1988) (later approved and filed by the District Court);

"F" Complaint, Civil No. 88-2370-07

"G" Complaint, *Durocher v. Vierra*, Civil No. 88-2074-07 (filed Haw. Cir. July 8, 1988);

"H" Opening and Answering Briefs in *Durocher v. Vierra*, Appeal No. 13395 (Haw. filed Jan. 5 and Feb. 21, 1989);

"I" *Bullen v. Derego*, No. 10486 (Haw. Aug. 22, 1986);

"J" Response to Defendant's Amended Request for Disclosure, CR. No. 86-1082 (Haw. Cir. Oct. 31, 1986).

3. The responses to the discovery requests filed February 27, 1989, in this action, by prior written and oral stipulations of the parties were timely made, and I understand no objection as to timeliness is made by the instant motion to compel, consistent with the good working relations between counsel in the case. So as to minimize costs

to the Plaintiff, the State did not require payment of the statutory rate for xerography for the return that was made. A full banker's box of documents, in my estimate more than 2,000 pages worth, was tendered to the Plaintiff, of which a substantial number were copied at her counsel's request.

4. Other than with respect to Plaintiff's medicaid provider agreement, which was not obtained promptly from DSH, but has now been obtained and produced by separate cover today, Counsel for plaintiff has made no effort, short of this Motion, to discuss, clarify, or narrow the requests that are the subject of this motion. Full compliance with a literal reading of the discovery requests, in your affiant's estimation, will be extraordinarily expensive, far in excess of the probative value thereof.

Further affiant sayeth naught.

/s/ Steven S. Michaels
Steven S. Michaels

Subscribed and sworn to before
me this 16th Day of May, 1989.

/s/ Isabelle M. Miller
Notary Public, State of Hawaii
My commission Expires: 6/16/90